

OPINION
77-1

March 18, 1977 (OPINION)

The Honorable Robert Peterson
State Auditor
State Capitol
Bismarck, ND 58505

Dear Mr. Peterson:

This is in reply to your letter of March 14, 1977, in which you set forth the following facts and questions:

"We request an opinion to determine the legality of the procedure whereby departments of State Government enter into agreements for the provision of material or services before the appropriation which will pay for the goods and services becomes effective. Examples of these types of transactions are:

1. A department orders vehicles in March in the last quarter of a biennium. The specified delivery date is in July or August when the new appropriation is in effect.
2. A department enters into an agreement before July 1 with architects and contractors for construction after the Governor has signed the appropriation bill which does not contain an emergency clause. Authority for the construction project is contained in the appropriation which becomes effective July 1.

We note the 1975 appropriation bills contain language providing for an appropriation for defraying expenses for the biennium beginning July 1, 1975 and ending June 30, 1977."

We assume both questions involve situations in which there is no emergency clause although only your second question refers to that fact. If the appropriation does contain an emergency clause, it becomes effective immediately upon approval of the Governor. Thus section 67 of the North Dakota Constitution provides:

"No act of the legislative assembly shall take effect until July first after the close of the session, unless the legislature by a vote of two-thirds of the members present and voting, in each house, shall declare it an emergency measure, which declaration shall be set forth in the act, provided, however, that no act granting a franchise or special privilege, or act creating any vested right or interest other than in the state, shall be declared an emergency measure. An emergency measure shall take effect and be in force from and after its passage and approval by the Governor."

Our response to your questions will be concerned with those situations in which the appropriation bill contains no emergency clause.

We realize that state agencies may believe an appropriation to be final once it has been enacted by the Legislature and approved by the Governor, and that they may obligate the State by contract to expenditure of such appropriation. We do not believe that to be the law, however. It is perfectly possible, although perhaps not probable, that a special legislative session could be convened wherein the appropriation would be repealed. Were such action to occur before July first, when the appropriation becomes available, we believe any contract entered into by such agency would be void. We are aware that a special session could also be convened and an appropriation repealed after it became effective on July first. However in that instance a contract entered into after the effective date of the appropriation repealed after it became effective date of the appropriation would be binding upon the State since the agency executing such contract had the authority to execute same. We cannot reach the same conclusion with respect to a contract entered into by the agency before July first, the effective date of the appropriation. Since the appropriation was not available and might not be available on July first should the Legislature subsequently convene and repeal it, there is no assurance the appropriation will be available.

We note the provisions of section 54-27-10 of the N.D.C.C. which provides in part:

"Unless otherwise authorized as provided in this section seventy-five percent of the total of all appropriations and of each separate item thereof made by the legislative assembly for the maintenance of any state institution, department, board, commission, or bureau for the biennium except institutions under the jurisdiction and supervision of the state board of higher education, shall become available on the first day of July succeeding the enactment by the legislative assembly. * * *
* The term 'maintenance' shall not apply to nor include moneys appropriated for the payment of the cost of any building or equipment or for making improvements and repairs to buildings and grounds, or any other special appropriations exempted from the operation of this section by the act making an appropriation. * * * "

The exemption for appropriations for buildings does not exempt such appropriations from the July first availability date, but rather from the provision that only seventy-five percent of the appropriation is available July first, i.e., an appropriation for the construction of a building, for example, would all be available on July first.

An appropriation which is available July first has no legal status until that date. As an example, a law requiring a license for a certain occupation may be repealed effective July first. However even after the enactment of the repeal bill and its approval by the Governor and until it is effective July first, a person entering that occupation must have the license. A bill which is not effective until a certain date is of no effect until that date.

Thus we note the statements in 82 C.J.S. 960, Statutes, section 390:

"The fixing of a date either by the statute itself or by

constitutional provision, when a statute shall be effective, is equivalent to a legislative declaration that the statute shall have no effect until the date designated; and, since a statute not yet in effect cannot be considered by the court, the period of time intervening between its passage and its taking effect is not to be counted; but such a statute must be construed as though passed on the day when it took effect.

When a bill has been passed by the legislature and signed by the governor, it becomes a law in the sense that it may not be changed or modified by the courts, and a statute may become a law on passage, even though by its own provision its effective date is postponed. In this connection it has been said that 'passage' of an act is understood to refer to the time when it is stamped with the requisite approval by the legislature and the chief executive, but that the going into effect of a bill refers to its becoming actually operative as existing law. It has been said that a statute may have a potential existence, although it will not go into operation until a future time, and that until the time arrives when it is to take effect and be in force, a statute which has been passed by both houses of the legislature and approved by the executive has no force whatever for any purpose. Before that time no rights may be acquired under it and no one is bound to regulate his conduct according to its terms, and all acts purporting to have been done under it prior to that time are void." (emphasis ours)

Without specific legislative authority for state agencies to enter into binding contracts prior to the effective date of the appropriations we do not believe the state agencies have such authority. It may be that it is the other party to the contract which should be concerned as to whether the state agency with which they are contracting has such authority. However the questions presented to us are in the context of the authority of the state agency to enter into such contracts. We would also note we have not considered the validity of conditional contracts entered into by such agencies, i.e., contracts which are entered into by a state agency conditioned upon the fact that funds will be available when payment is due. We believe such contracts would be considered valid since they do not purport to bind the State unless the funds are actually available as of the date payment is due.

In direct response to your questions:

1. It is our opinion that, if a department orders vehicles in March in the last quarter of a biennium with a specified delivery date in July or August, after the department's new appropriation becomes available, the contract is not an authorized contract and is void unless the contract specifies it is contingent on funds being available at the date of payment and such funds are, in fact, available at that time.
2. It is our opinion that, if a department enters into an agreement before July first with architects and contractors for construction after the Governor has signed the appropriation bill but which bill does not contain an

emergency clause the contract is not an authorized contract and is void unless the contract specifies it is contingent on funds being available at the date of payment and such funds are, in fact, available at that time.

Sincerely,

ALLEN I. OLSON

Attorney General